DISTRIBUTED

JAN 3 1985

Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-500

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, F. E. UITHOVEN, G. E. UITHOVEN, and CARRIE UITHOVEN

PETITIONERS

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

J. ARTHUR SMITH, III
Counsel of Record
524 France Street
Baton Rouge, LA 70802
(504) 383-7716

Attorney for Petitioners

TABLE OF CONTENTS

	PAGE
Table of Authorities.....	ii
Argument.....	1

TABLE OF AUTHORITIES

	PAGE
STATUTES	
16 U.S.C. §470(a)	10
16 U.S.C. §470(d)	3
40 U.S.C. §258(a)	1
REGULATIONS	
33 C.F.R. §230.5	10
36 C.F.R. §800.3(a)	2
36 C.F.R. §800.9	10
40 C.F.R. §1502.25	10
CASES	
Environmental Society, Inc. v. Coleman, 537 F.2d 79 (5th Cir.1975)	6
Maiatico v. U.S. 302 F.2d 880 (D.C. Cir. 1962)	2
Morris County Trust For Historic Preservation v. Pierce, 714 F.2d 271 (3rd Cir. 1983)	3
United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D.C. Idaho 1975) (Pet. App. 89-132)	2
United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970)	2
United States v. 18.2 Acres of Land, 442 F.Supp. 800 (E.D. Calif.1977)	1
United States v. 247.37 Acres, 3 ERC 1098 (S.D. Ohio. W.D. 1971)	1

ARGUMENT

The Government suggests to this Court that a condemnation of a historic site is a "neutral act" which cannot have any adverse effect on preservation values.

We respectfully submit that this argument is erroneous and that the "taking" and the "use" should not be viewed separately. Indeed, a condemnation action is, by its very nature, a decision to put land to a certain public use, which may have a significant effect on the environment, and the Declaration of Taking Act (DOTA) explicitly requires a "statement of...the public use for which said lands are taken." United States v. 18.2 Acres of Land, 442 F.Supp. 800 (E.D. Calif. 1977) at 807; United States v. 247.37 Acres, 3 ERC 1098, (S.D. Ohio. W.D.1971) at 1104; 40 U.S.C. §258(a). Moreover, the regulations of the Advisory Council on Historic Preservation do not view the "taking" and "use" separately. An undertaking is considered to have an "effect" whenever it is reasonably foreseeable that the undertaking may later cause

any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property for listing on the National Register of Historic Places. 36 C.F.R. §800.3(a).

The government also erroneously argues that "there is no meaningful relief that could now be awarded petitioners."

Courts do have the power to dismiss a condemnation action in the situation where the court determines that the agency lacks the authority to condemn or, in DOTA terms, is not "empowered by law to acquire the lands." See United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970) and Maiatico v, United States, 302 F.2d 880 (D.C. Cir. 1962) in which the courts dismissed condemnation actions. See also United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D.C. Idaho 1975) (Pet. App. 89-132) where the court dismissed a condemnation action and declaration of taking without prejudice to the Government to refile following compliance with NHPA. Indeed, the cases relied upon by the Government for the proposition that the courts

are without power to dismiss a condemnation actions do not deal with the situation where the agency lacks the authority to condemn and therefore are inapposite.

The dismissal of this condemnation action with directions to the agency to comply with NHPA before making the decision whether to condemn this historic site would be meaningful relief and would serve the interests Congress sought to achieve in enacting NHPA because the agency condemnation decision in this case involved two subsidiary decisions which strongly implicate historic preservation interests

The first subsidiary decision was the decision to prevent the private preservation activities of the Uithovens and commit the historic site to public usage. One of Congress's principal purposes in enacting NHPA was "to give maximum encouragement to agencies and individuals undertaking preservation by private means." 16 U.S.C. §470(d); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3rd Cir.1983) at 278. Constitutional protection of private property ownership is, or

should be, so important that Governmental actions in derogation of private property rights must be taken only after full and strict compliance with procedural requirements indispensable to the lawful exercise of the federal power of eminent domain.

The Uithovens are landowners who have been managing this land and living in this national treasure, their architectural heritage, for nearly seventy years, preserving it these many decades and allowing public use consistent with preservation. As noted in the 1976 United States Department of Interior "National Register of Historic Places Inventory-Nomination Form":

> "The house (Cedar Oaks) is currently the subject of a preservation and restoration effort under the direction of an owner who is concerned with the history and future of the Colbert and Barton sites."

Contrary to the Government's suggestion, Federal ownership does not increase the legal protection of this, or any other, historic site. Having acquired the property, the federal Government is free to alter, or even destroy, its own historic site or structure.

We respectfully submit that public ownership and high density public use made possible by public ownership will self-evidently result in significant adverse environmental and social impacts vis-a-vis this heretofore substantially undisturbed historic site and building. It is common knowledge that the public frequently abuses public facilities. (For example, one can readily envision "MARY LOVES JOE" and other graffiti defacing Cedar Oaks). The introduction of millions of visitors and campers into a substantially undisturbed and serene historic site, as planned by the Corps of Engineers,[1] would substantially degrade its setting.

Moreover, the agency condemnation decision in this case involved the subsidiary decision to locate the high density public use project on this site a historic site individually listed on the National Register of Historic Places[2] rather than in another location in the hundreds of miles of shoreline along the waterway. Certainly, for an agency proposal to construct a high density public usage project on historic

site, the consideration of alternative locations at which the project may be constructed is a most important historic preservation consideration. C.F. Environmental Society, Inc. v. Coleman, 537 F.2d 79 (5th Cir.1975).

The procedural errors of the Corps in failing to consider the alternatives of private preservation and alternative sites were not corrected during a second determination of the matter by the Corps. Indeed, there is no evidence in the record that the Corps ever reconsidered the taking of this historic site after it belatedly attempted to comply with NHPA and NEPA. Moreover, the Court never applied the NHPA or NEPA analysis to the agency decision to condemn this historic site.[3] The Corps made the decision to condemn this historic site before conducting the environmental reviews required by the statutes. Then, after the condemnation, the Corps attempted to comply with these statutes and the courts below, in deference to the first decision of the Court of Appeals in the instant case, held that the Corps had complied with these statutes even though the decision to condemn

was effectively exempted from review under these statutes. The combined effect of these Agency-Court actions was that the Corps made the decision to condemn this historic site prior to statutory compliance and locked itself into that decision by the declaration of taking and the payment of just compensation. Thereafter, the Corps conducted the statutory analyses but did not apply these analyses to the agency decision to condemn this historic site-either when the condemnation decision was originally made or after the statutory reviews were conducted.

This Court should review this case and apprise Federal agencies of two very important legal requirements:

Firstly, they cannot merely generate the NHPA-NEPA analyses on an ex post facto basis after the agency decisions are made. They must apply these analyses to the agency decisions at hand.

Secondly, the agencies must apply the NHPA-NEPA analyses to the correct agency decisions, in this case, the decision is whether to condemn the historic site in the first place. There

is significant difference between deciding whether to initiate a condemnation and deciding whether to continue with an acquisition which has already taken place. This is particularly so in the context of the condemnation of a National Register site where the condemnation is, or should be, subject to NHPA requirements. NHPA wisely focuses on the initial decision to commit Federal resources. Having already spent these Federal funds and filed a declaration of taking, these resources are now committed. Thus, the decision before the agency at that point is not focused on whether to commit Federal resources, as required by NHPA, but rather the issue shifts from initial desirability to "sunk cost" practicalities. If the agency was required to rescind the declaration of taking and make an informed agency decision as whether to commit Federal resources to the acquisition of the historic site only <u>after</u> the consideration of information generated by the NHPA and NEPA review processes, one may reasonably expect that the agency would not condemn this National Register

site and subject this national treasure to high density development.

Finally, we close with the observation that this is not a case of a landowner thwarting the policy priorities and will of Congress for no practical purpose as opposing counsel would have the Court believe. Rather it is a case of a federal agency unlawfully seizing private property and expending public funds contrary to the explicit policy and intent of the Congress. The lower courts have aided the agency usurpation of power by substituting their policy judgment for the clearly expressed and politically determined law which explicitly mandates prior compliance.

The Government argues that "the practical consequences of a reversal would be insignificant." In substance this argument de facto maintains that reversal now can do no good, thus intimating that the agencies are bound and determined not to totally re-review this matter at a meaningful stage of their decisional processes. Such agency willfulness, aided by the lower courts, should not prevail over

congressional will in this the Highest Court of Law in the land. Time and again, this Court has refused to repeal, as "insignificant", laws written by the Congress. It should again so refuse, put Law above agency willfulness, and not permit de facto repeal of the historic preservation laws of the nation.

RESPECTFULLY SUBMITTED:

J. ARTHUR SMITH, III
524 France Street
Baton Rouge, LA 70802
(504) 383-7716
Attorney for Petitioners

1. The record shows that the Columbus Lake recreational facilities, of which the proposed Barton Ferry recreation area is the largest, are projected by the Corps to handle approximately 1.6 million visitors in 1986 and 3.7 million visitors annually by the year 2035.
2. The "Colbert-Barton Townsites" is a "historic site" individually listed on the National Register of Historic Places under the provisions of NHPA, 16 U.S.C. §470(a).
3. Regulations of the Council on Environmental Quality (CEQ), Corps of Engineers, and Advisory Council on Historic Preservation all require that the environmental review conducted pursuant to NHPA be done concurrently with the environmental review conducted pursuant to NEPA so that the results of both environmental reviews may be integrated for the agency decision maker and the public. 40 C.F.R. §1502.25; 33 C.F.R. §230.5 and 36 C.F.R. §800.9.

CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing hae been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C. 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 20530, this 2nd day of January, 1985.

J. ARTHUR SMITH, III